

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
THE NEW YORK CITY DISTRICT COUNCIL OF  
CARPENTERS PENSION FUND, NEW YORK CITY  
DISTRICT COUNCIL OF CARPENTERS WELFARE  
FUND, NEW YORK CITY DISTRICT COUNCIL OF  
CARPENTERS VACATION FUND, NEW YORK CITY  
DISTRICT COUNCIL OF CARPENTERS ANNUITY  
FUND, NEW YORK CITY DISTRICT COUNCIL OF  
CARPENTERS APPRENTICESHIP, JOURNEYMAN  
RETRAINING, EDUCATIONAL AND INDUSTRY  
FUND, NEW YORK CITY DISTRICT COUNCIL OF  
CARPENTERS CHARITY FUND, UNITED BROTHERHOOD  
OF CARPENTERS AND JOINERS OF AMERICA FUND and  
THE NEW YORK CITY AND VICINITY CARPENTERS  
LABOR-MANAGEMENT CORPORATION, by MICHAEL  
J. FORDE, and GEORGE GRECO, as TRUSTEES, and  
MICHAEL J. FORDE, as EXECUTIVE SECRETARY-  
TREASURER, DISTRICT COUNCIL FOR NEW YORK  
CITY AND VICINITY, UNITED BROTHERHOOD OF  
CARPENTERS AND JOINERS OF AMERICA,

Plaintiffs,

-against-

COMMERCIAL DIVING SERVICE, INC.,

Defendant.  
-----X

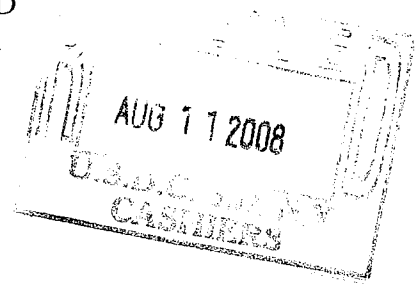
Plaintiffs ("Benefit Funds"), by their attorneys O'Dwyer & Bernstein, LLP, for their  
Complaint allege as follows:

**NATURE OF THE CASE**

1. This is an action to confirm and enforce an Arbitrator's Award rendered pursuant to a collective bargaining agreement ("Agreement") between The District Council of New York City and Vicinity of the United Brotherhood of Carpenters and Joiners of America ("Union") and Commercial Diving Service, Inc. ("Employer").

JUDGE COTE  
'08 CIV 7148

**COMPLAINT**



### **JURISDICTION**

2. This Court has jurisdiction over this proceeding pursuant to section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §185, sections 502(a)(3)(B)(ii), (d)(1), (e) and (g) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§1132(a)(3)(B)(ii), (d)(1), (e) and (g), section 515 of ERISA, 29 U.S.C. §1145, and section 9 of the Federal Arbitration Act, 9 U.S.C. §9.

3. Personal jurisdiction is based upon Section 502(e)(2) of ERISA, 29 U.S.C. §1132(e)(2).

### **VENUE**

4. Venue is proper in this district in that Plaintiffs' offices are located in this district.

### **PARTIES**

5. At all times relevant herein the Plaintiffs were jointly administered, multi-employer, Taft-Hartley Benefit Funds administered by trustees designated by a union and by employers, established and maintained pursuant to section 302(c)(5) of the LMRA, 29 U.S.C. §186(c)(5). Plaintiffs Forde and Greco are fiduciaries of the Benefit Funds within the meaning of ERISA sections 3(21) and 502, 29 U.S.C. §§1002(21) and 1132.

6. The Benefit Funds are employee benefit plans within the meaning of sections 3(1) and (3) of ERISA, 29 U.S.C. §1002(1) and (3) and are maintained for the purposes of providing health, medical and related welfare benefits, pension and other benefits to eligible participants and beneficiaries on whose behalf they receive contributions from numerous employers pursuant to collective bargaining agreements between the employers and the Union.

7. Upon information and belief defendant is a foreign corporation incorporated under laws of the State of New Jersey with a principal place of business located at 439 North

Main Street, Manville, NJ 08835.

8. The defendant is an employer within the meaning of section 3(5) of ERISA, 29 U.S.C. §1002 (5).

**FIRST CLAIM FOR RELIEF**

9. Defendant was bound at all relevant times by a collective bargaining agreement with the Union, which, by its terms, became effective July 1, 1996. Said Agreement provides, inter alia, that the defendant shall furnish its books and payroll records when requested by the Benefit Funds for the purpose of conducting an audit to ensure compliance with required benefit fund contributions and for the submission of disputes to final, binding arbitration.

10. A dispute arose during the period of the Agreement between the parties when the Employer failed to comply with the Benefit Funds' demands to furnish its books and records for the purpose of conducting an audit.

11. Pursuant to the arbitration clause in the Agreement, the dispute was submitted to arbitration to Robert Herzog, the duly designated impartial arbitrator.

12. Thereafter, upon due notice to all parties, the arbitrator duly held a hearing and rendered his award, in writing, dated June 2, 2008 determining said dispute. Upon information and belief, a copy of the award was delivered to the defendant (A copy of the award is annexed hereto as Exhibit "A" and made part hereof).

13. The arbitrator found that defendant had failed to comply with the Agreement as it relates to paying fringe benefit monies and directed it to furnish the Plaintiffs with any and all books and records, for the period of July 1, 2002 through June 30, 2006 including but not limited to, the cash disbursement section of the cash book, general ledger, job location records, daily time records and all certified payrolls.

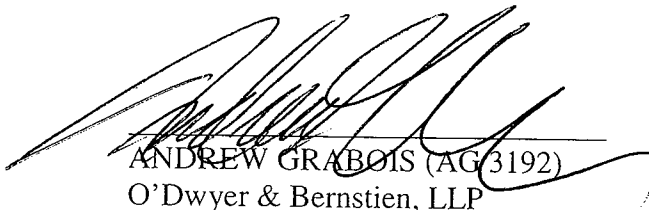
14. The arbitrator also found that defendant was required to pay the funds a sum of \$2,350.00 pursuant to the Agreement, representing costs incurred in the arbitration.

15. The defendant has failed to abide by the award.

WHEREFORE, Plaintiffs demand judgment against defendant as follows:

1. For an order confirming the arbitration award in all respects;
2. For entry of judgment in favor of the Plaintiffs ordering defendant and its officers to make available to the Plaintiffs or authorized representatives any and all books and records deemed necessary to conduct an audit including, but not limited to, the cash disbursement section of the cash book, general ledger, job location records, daily time records and all certified payrolls for the period July 1, 2002 through June 30, 2006;
3. For entry of judgment in favor of the Benefit Funds and against Commercial Diving Service, Inc. ordering defendant to pay the Benefit Funds a total sum of \$2,350.00 with interest to accrue at the rate of 10% from the date of the award, pursuant to the arbitrator's award;
4. For attorneys' fees and costs of this action;
5. For such other and further relief as this court may deem just and proper.

Dated: New York, New York  
August 11, 2008



ANDREW GRABOIS (AG 3192)  
O'Dwyer & Bernstein, LLP  
Attorneys for Plaintiffs  
52 Duane Street  
New York, NY 10007  
(212) 571-7100

# **EXHIBIT A**

**ORIGINAL**

OFFICE OF THE IMPARTIAL ARBITRATOR

-----X  
In The Matter Of The Arbitration

between

New York City District Council of Carpenters  
Pension Fund, New York City District Council of  
Carpenters Welfare Fund, New York City  
District Council of Carpenters Vacation Fund,  
New York City District Council of Carpenters  
Annuity Fund, New York City District Council  
of Carpenters Apprenticeship, Journeyman  
Retraining, Educational and Industry Fund,  
New York City District Council of Carpenters  
Charity Fund, United Brotherhood of Carpenters  
and Joiners of America Fund and The New York  
City and Vicinity Carpenters Labor-Management  
Corporation, by Michael J. Forde and George  
Greco, as Trustees

DEFAULT

AWARD

And

Michael J. Forde, as Executive Secretary-  
Treasurer, District Council for New York City  
and Vicinity, United Brotherhood of Carpenters  
and Joiners of America

(Petitioners)

-and-

COMMERCIAL DIVING SERVICE

(Employer)

-----X  
BEFORE: Robert Herzog, Esq.

COMMERCIAL DIVING SERVICE (hereinafter referred to as the  
"Employer") and the District Council of New York City and Vicinity  
of the United Brotherhood of Carpenters and Joiners of America, are  
parties to the Independent Heavy Construction Dockbuilding Marine  
and Foundation Collective Bargaining Agreement, dated July 01, 1996  
and to the Interim Compliance Agreement effective July 1, 2002.

Interim Compliance Agreement Article V, entitled "Execution and Compliance with New Agreement," states:

**Our firm, its successors and/or assignees, shall execute successor Agreements(s) within five (5) days of the receipt of the Union's request. However, our firm shall be bound to the terms contained in the New Agreement(s) retroactive to July 01, 2002, by virtue of executing this Agreement, regardless of whether it actually executes a successor Agreement.**

The Collective Bargaining Agreement and successor Agreement provide for arbitration of disputes before the undersigned Arbitrator as Impartial Arbitrator, and in which the Employer has therein agreed, for the duration of the agreements, to pay contributions to employee benefit funds (hereinafter collectively referred to as the "Funds"). The Petitioners, as beneficiaries of the Collective Bargaining Agreements, have standing before the Arbitrator. In accordance therewith, the Petitioners, by an April 4, 2008 Notice of Intention to Arbitrate, demanded arbitration. The Petitioners alleged the Employer failed to permit the Funds to conduct an audit of its books and records for the period of July 1, 2002 through to date to determine whether it is in compliance with its obligation to contribute to the Funds. A Notice of Hearing dated April 30, 2008 advised the Employer and the Petitioners that the arbitration hearing was scheduled for May 20, 2008.

The Notice of Hearing was sent to the Employer by regular and certified mail. A United States Postal Service Certified Mail Return Receipt evidences delivery of the Notice of Hearing to the Employer.

On May 20, 2008, at the place and time designated by the aforesaid Notice of Hearing, Steven Kasarda, Esq. appeared on behalf of the Petitioners. No appearance on behalf of the Employer was made. Also, no written, mutually agreed upon waiver by the parties to adjourn the proceeding, as required by the Successor Collective Bargaining Agreement, was presented. The arbitration proceeded as a Default Hearing. Full opportunity was afforded the parties present to be heard, to offer evidence, and to examine witnesses. The Petitioners thereupon presented their proofs to the Arbitrator.

The uncontroverted testimony and evidence established that:

- During the July 1, 2002 to June 30, 2006 period, the Employer was bound to the Successor Collective Bargaining Agreement with the District Council of New York City and Vicinity of the United Brotherhood of Carpenters and Joiners of America.
- The Successor Collective Bargaining Agreement obligated the Employer to make certain payments to Fringe Benefit Trust Funds on behalf of all its carpenter employees pursuant to schedules set forth in the Successor Agreement.
- The Successor Collective Bargaining Agreement authorized the Funds to conduct an audit of the Employer's books and records in order to verify that all the required contributions were made to each of the aforesaid Fringe Benefit Trust Funds maintained by the Funds.
- In accordance with this auditing provision, an accountant, employed by the Funds, sought to conduct an audit of the



Employer's books and records. In violation of this auditing provision, the Employer did not consent to an audit of the Employer's books and records.

#### AWARD

Based upon the substantial and credible evidence of the case as a whole:

1. COMMERCIAL DIVING SERVICE is in violation of the terms of the Successor Collective Bargaining Agreement in accordance with the terms of the Interim Compliance Agreement;
2. COMMERCIAL DIVING SERVICE is ordered to permit and facilitate the Funds conducting an audit of its books and records for the period of July 1, 2002 through to June 30, 2006 to determine whether it is in compliance with its obligations to contribute to the Funds;
3. COMMERCIAL DIVING SERVICE shall pay to the Funds forthwith the Petitioners' counsel's fees, the undersigned Arbitrator's fee, and all associated court costs in the following amounts:

Court Costs	\$ 350.00
Attorney's Fee	1,500.00
Arbitrator's Fee	<u>500.00</u>
TOTAL	\$2,350.00

4. COMMERCIAL DIVING SERVICE shall pay to the District Council Carpenters Benefit Funds the aggregate amount of two thousand

three hundred fifty dollars (\$2,350.00) with interest to accrue  
at the rate of 10% from the date of this Award.

  
Robert Herzog  
Arbitrator

Dated: June 2, 2008

State of New York )  
County of Rockland )

I, Robert Herzog, do hereby affirm upon my oath as Arbitrator  
that I am the individual described in and who executed this  
instrument, which is my Award.

  
Robert Herzog  
Arbitrator

Dated: June 2, 2008

To: COMMERCIAL DIVING SERVICE  
Attn: Mr. Russell Pangborn, President  
439 North Main Street  
Manville, New Jersey 08835

Steven Kasarda, Esq.  
New York City District Council Carpenters Benefit Funds  
395 Hudson Street  
New York, New York 10014